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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 574

CLYDE BURDETTE BORNHURST, A MINOR, BY ISABEL BORNHURST, HIS GUARDIAN AD LITEM,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 574

CLYDE BURDETTE BORNHURST, A MINOR, BY ISABEL BORNHURST, HIS GUARDIAN AD LITEM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Clyde Burdette Bornhurst, (by Isabel Bornhurst, his Guardian ad Litem) seaman, for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Ninth Circuit, entered on the 4th day of December, 1947, affirming a judgment dismissing his action entered March 3, 1947 by the District Court of the United States for the Southern District of California, Central Division, respectfully shows:

Summary Statement of Matter Involved

This petition squarely presents the question reserved in the concluding paragraph of the opinion of this court

in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, as to the shipowner's duty with respect to maintaining a seaworthy vessel for seamen not actually working.

The United States Circuit Court of Appeals for the Ninth Circuit, contrary to the provisions of Title 46 U. S. C. A., Sec. 688, and contrary to the admiralty law governing seaworthiness, denied to a seaman recovery for injuries received aboard his vessel, on the narrow ground that he "assumed the risk" of a dangerous, negligent and unseaworthy condition because he was not actually working at the time of his injury.

The petitioner was one of three wipers aboard the vessel and immediately before receiving the injury had been engaged, pursuant to orders, in cleaning the quarters of the engine room crew in a forecastle having a temperature of above 100 degrees. During a breathing or cooling off period petitioner idly rested his hands on a tank top coaming and received serious injuries to his hands through the sudden falling of the tank top weighing some 600 pounds upon his hands. The Circuit Court of Appeals, affirming the lower court, held that he alone was negligent in that he "voluntarily and not in the performance of any work or duty which he was required to do or perform, placed his hands on the edge of the tank. * * * Said acts on the part of libelant were prompted solely and exclusively by the libelant's curiosity. * * * The libelant had no duties of any kind to perform at or near the tank top, and if the libelant had continued in the performance of his regular duties he would not have been injured" (R., p. 219).

This conclusion of the Circuit Court of Appeals adopted the conclusion of the District Judge who tried the case to the effect that if the petitioner "in the course of his duties, had to go over and put his hands on the edge of that tank top and lean over and look into it, then * * * there is no doubt but what he would be entitled to recover" (R.,

p. 215). The court concluded that because the petitioner was not actually working he assumed the risk of the conditions that caused the injury (R., pp. 211, 212, 213, 216).

This record presents squarely the question reserved by this court in the final paragraph of *Socony-Vacuum Oil Co.* v. *Smith,* (1939) 305 U. S. 424, 59 S. Ct. 262, 267: Does the duty owed a seaman under the Jones Act and also with respect to seaworthiness enure to and protect a seaman when he is in common parlance "off duty" or resting aboard ship? The Circuit Court answered this question against liability to the seaman, contrary to its own decisions and the decisions of a number of other circuits, and dismissed petitioner's libel for injuries thus received.

Sundberg v. *Washington Fish & Oyster Co.* (C. C. A.-9) 138 F. (2d) 801, 803;

States S. S. Co. v. *Berglann,* (C. C. A.-9, 1930) 41 F. (2d), 456, 457, 458;

United Dredging Co. v. *Lindberg* (C. C. A.-5, 1927), 18 F. (2d), 453, 455; cert. denied 274 U. S. 759;

Kyriakos v. *Goulandris,* (C. C. A.-2, 1945), 151 F. (2d), 132, 138;

Krey v. *United States* (C. C. A.-2), 123 F. (2d) 1008.

The question of "off-duty liability" reserved in *Socony-Vacuum Oil Co.* v. *Smith, supra,* was answered in favor of liability with respect to shore injuries in relation to maintenance and cure in *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724; 63 S. Ct. 930. But the reserved question with respect to off-duty liability under the Jones Act for unseaworthiness has not yet been passed upon by this court, and is squarely presented by this petition. The adverse ruling of the District Court on this issue was affirmed by the Circuit Court of Appeals.

The trial court signed formal findings prepared by counsel for respondent. These findings did not follow the deci-

sion or reasoning of the trial court in that they purport to exonerate the ship from the charges of unseaworthiness, negligence and damages. It is, therefore, necessary to review the salient facts as to how the petitioner received his injuries and briefly the nature of the unseaworthiness established by petitioner. A more detailed reference to this testimony is included in the brief accompanying this petition.

Clyde Bornhurst, aged 16 years (R., p. 36), was one of three wipers employed on the respondent's tanker SS Puente Hills on May 12, 1945, at a monthly wage. While the vessel was anchored off Finschaven, New Guinea, he had been assigned to cleaning and sweeping the hot, dusty, forecastle where the temperature was above 100 degrees. After working for an hour or so he went out to the well deck to "get a breath of fresh air," idly leaned against a tank top, and received serious injuries to his hands when a tank top cover dropped upon them.

The tank top is a cylindrical iron collar about 5 feet in diameter and about 2½ feet high, rising from the well deck around an opening in the tank itself. A heavy cover or lid, weighing about 600 pounds, hinged at the rear, is raised or lowered by operation of a "jack screw" mechanism. The jack screw is a large threaded bolt about 6 feet long and 1½ inches in diameter, upon which a "swivel plate" is turned as the tank cover is moved. As the cover raises the jack screw tilts backward. Due to the "worm gear" the movement of the cover itself is imperceptibly slow, as the swivel plate nut is turned by use of a large ratchet wrench.

The tank top raising mechanism was badly rusted (R., p. 98) corroded and "frozen" (R., p. 121). This condition was apparent to the mates and men in the deck department (R., p. 103). It had existed since the vessel left San Pedro, California (R., p. 101). Witness Binder,

the maintenance man, whose duty it was to keep the parts in good working order (R., p. 70) had discussed the condition with the Chief Mate (R., p. 132, 133), but nothing was done. He reported the condition to the boatswain and asked permission to repair and grease these moveable parts because there was a danger. He was positive that the hack screw on the tank top where the accident occurred was corroded (R., p. 133). The boatswain discussed the condition with the Chief Mate before the accident (R., p. 112, 115), but no order was given to him to "unfreeze" the jack screw.

On May 12, 1945, and prior to the accident, when the vessel was 36 days out from San Pedro, two men, under the direction of the Chief Mate, were attempting to raise the tank top cover. Due to its "frozen" condition they were having some difficulty and were using a large ratchet wrench with a leverage of about 1½ or 2 feet (R., p. 48). They had succeeded in raising it to about a 45 degree angle, where it apparently became fast.

Petitioner, while this work was going on, had been sweeping the engine room crew's quarters on the well deck level. He commenced this work at about 8:00 A. M. (R., p. 41). It was hot and dusty in the forecastle (R., p. 64). The Chief Engineer Haugen testified that it was close to 100 degrees on deck and higher in the forecastle (R., p. 190), and that it is customary and necessary (R., p. 191) for a man to go out on deck for a "breath of fresh air" (R., p. 200). Petitioner left the forecastle, went a short distance (R., p. 85) to the tank top, to lean against it and rest (R., p. 64). With the curiosity characteristic of a 16 year old boy, he looked into the half open tank (R., pp. 64-5). He faced the tank top and placed his hands on the coaming. There is some doubt as to whether the tank top was actually moving (R., p. 67). Petitioner himself does not remember whether it was or not, but the fact that the men doing the work applied sufficient force to break the jack

screw, attempting to move it, justifies the inference that the cover was not in motion. In any event, if the mechanism had been well greased and in perfect working order the upward motion would have been so slow as hardly to have been noticed.

The jack screw being titled backward with the cover at a half-opened position, the men were crouching behind the cover to turn the wrench. They applied sufficient pressure to break the brass bolt, 1½ inches in diameter.

The cover, held only by the jack screw, fell suddenly. Someone, possibly the mate (R., p. 68) shouted "Look out." Petitioner had time to withdraw his head and shoulders, but the cover fell heavily on his hands. The permanent injuries he suffered were described by Dr. Spear as a "horribly deformed left hand" (R., p. 159).

After the accident the broken jack screw was examined. The ends showed a flaw or "airpocket" (R., p. 174) the size of a dime or penny (R., pp. 125, 126), the break was "clean" around the perimeter (R., p. 129) but not at the center (R., p. 128) where it was discolored. The broken jack screw was replaced by a replacement part, carried aboard, because these jack screws "worked hard" and were expected to break (R., p. 196). Some of them did break and nearly all of them bent (R., p. 127).

The Basis of the Court's Jurisdiction

The jurisdiction of this Court is founded upon Section 240(a) of the Judicial Code, as amended, Title 28 U. S. C. A., Sec. 347(a).

The Federal Statutes construed by the court below, which construction is claimed to be in error, are as follows:

The Jones Act (June 5, 1920, C. 250, Sec. 33, 41 Stat. 1007, Title 46 U. S. C. A. Sec. 688;

Federal Employers' Liability Act (April 22, 1908) c. 149, Sec. 1, 3, 4, 35 Stat. 65, 66; August 11, 1939, c. 685, Sec. 1, 53

Stat. 1404, Title 45 U. S. C. A. Sec. 51; Title 45 U. S. C. A., Sec. 51, 53, 54.

The date of the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit sought to be reviewed is December 4, 1947.

This petition presents the following special and important reasons for review of the opinion and decree below:

(a) The Circuit Court of Appeals by its decision has ignored the fact that the ship, particularly at sea, is both the home of the seaman and the place in which the seaman works. In both particulars the seaman must accept the conditions as he finds them, both during his hours on duty and in those periods when he is relaxing or even indulging in the satisfaction of an idle "curiosity."

(b) The Circuit Court of Appeals in its opinion has refused to give effect to the rule which makes the ship responsible to a seaman injured through negligence or unseaworthiness during periods he is not working.

(c) The Circuit Court of Appeals has, in the decision and decree appealed from, decided an important question of admiralty law which has not been, but which should be, settled by the Supreme Court, being the point of law expressly reserved in the final paragraph of the decision of this Court in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262, 267 (Rule 38(b)).

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Ninth Circuit, is dated December 4, 1947. The case on appeal was heard by Justices Mathews, Stephens and Orr.

Questions Presented

The questions presented are:

(a) Whether or not the United States Circuit Court of Appeals, 9th Circuit, and the District Court erred in not holding that the ship was under a legal duty to avoid injuring a seaman either negligently or through an unseaworthy

condition during a time when the seaman was not performing the particular tasks assigned to him and was resting from his work.

(b) Whether or not said lower courts erred in not finding that the proximate cause of petitioner's injuries was the unseaworthiness of said ship.

Reasons Relied upon for Allowance of Writ

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit on the basic question of liability, assumption of risk and contributory negligence is in direct conflict with the applicable decisions of this Court in:

Mahnich v. *Southern S. S. Co.* (1944), 321 U. S. 96;
Arizona v. *Anelich* (1936), 298 U. S. 110;
Beadle v. *Spencer* (1936), 298 U. S. 124;
Tiller v. *Atlantic Coast Line R. Co.* (1943), 318 U. S. 54;
Socony-Vacuum Oil Co. v. *Smith* (1939), 305 U. S. 424.

(2) The question of whether a seaman who is injured by an unsafe appliance while "off duty" was specifically reserved in the final paragraph of:

Socony-Vacuum Oil Co. v. *Smith* (1939), 305 U. S. 424.

(3) The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the following Circuits:

Second Circuit:

The H. A. Scandrett (1937), 87 F. (2d) 708;
Krey v. *U. S. A.* (1941), 123 F. (2d) 1008;
Kyriakos v. *Goulandris* (1945), 151 F. (2d) 132.

Fifth Circuit:

United Dredging Co. v. *Lindberg* (1927), 18 F. (2d) 453 (Cert. denied 274 U [illegible] 39).

Its own decisions in the *Ninth Circuit:*

Sundberg v. *Washington Fish and Oyster Co.* (1943), 138 F. (2d) 801;
States S. S. Co. v. *Berglann* (1930), 41 F. (2d) 456.

(4) The decision of the Circuit Court of Appeals is entirely contrary to the principles of this Court announced in the case of:

Aguilar v. *Standard Oil Co.* (1943), 318 U. S. 724;

where this Court held that a seaman "off duty" was nevertheless sufficiently within "the framework of his existence" and scope of his employment to entitle him to recover maintenance and cure.

(5) The decision of the Circuit Court of Appeals presents the important question reserved in *Socony-Vacuum Oil Co.* v. *Smith, supra,* as to whether the ship was liable to petitioner for an unseaworthy condition which proximately caused petitioner's injuries during a period he was temporarily resting from his assigned work.

Prayer

WHEREFORE your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, Ninth Circuit, commanding said court to certify and send to this Court the transcript of the record in the above entitled Clyde Burdette Bornhurst, a minor, by Isabel Bornhurst, his guardian *ad litem,* appellants, vs. United States of America, appellee, No. 11,577, and all the proceedings in said United States Circuit Court of Appeals to the end that said cause may be reviewed and determined by this Court and the judgment of the United States District Court, for the Southern District of California, Central Division, and the judg-

ment of the United States Circuit Court of Appeals, Ninth Circuit, be reversed and the case remanded for further proceedings according to law.

CLYDE BURDETTE BORNHURST,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 574

CLYDE BURDETTE BORNHURST, A MINOR, BY ISABEL BORNHURST, HIS GUARDIAN AD LITEM,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals has not as yet been officially reported, but is printed in the record (R., p. 218).

No oral opinion was rendered by the District Court for the Southern District of California, Central Division, but its findings of fact and conclusions of law appear in the record (R., pp. 17-20) and a clear explanation of the court's decision appears in a colloquy between the court and counsel (R., pp. 208-216). At page 209 the court ruled that the law as announced in the *Mahnich* case (*Mahnich*

v. *Southern S. S. Co.*, 321 U. S. 96 (1943) was applicable only when the seaman was injured while in the performance of some duty. On page 210, the court stated that if this injury had occurred in the performance of one of petitioner's duties he would not have been held to have assumed the risk. And for further statements by the court to this effect see the record (R., pp. 211, 212, 215, 216).

Grounds on Which Jurisdiction of the Supreme Court of the United States Is Invoked

The jurisdiction of this court is founded upon Section 240(a) of the Judicial Code, as amended, Title 28 U.S.C.A. Sec. 347(a). The Federal Statutes construed by the court below, which construction is claimed to be in error, are as follows:

Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1, 3, 4, 35 Stat. 65, 66, August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; Title 45 U.S.C.A., Sec. 51; Title 45 U.S.C.A., Secs. 51, 53, 54; Jones Act, Sec. 688, Title 46 U.S.C.A.; Liability for unseaworthiness as defined in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; 66 S. Ct. 872.

The petition presents the following special and important reasons for review of the opinion below:

(a) The Circuit Court of Appeals by its decision has ignored the fact that the ship, particularly at sea, is both the home of the seaman and the place in which the seaman works. In both particulars the seaman must accept the conditions as he finds them, both during his hours on duty and in those periods when he is relaxing or even indulging in the satisfaction of an idle "curiosity."

(b) The Circuit Court of Appeals in its opinion has refused to give effect to the rule which makes the ship responsible to a seaman injured through negligence or unseaworthiness during periods he is not working.

(c) The Circuit Court of Appeals has, in the decision and decree appealed from, decided an important question of admiralty law which has not been, but which should be, settled by the Supreme Court, being the point of law expressly reserved in the final paragraph of the decision of this Court in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424; 59 S. Ct. 262, 267; (Rule 38(b), Revised Rules of the Supreme Court.)

Statement of the Case

Petitioner, aged 16 years (R., p. 36) on April 17, 1945, signed shipping articles for employment by respondent on the tanker owned by it known as the SS PUENTE HILLS (R., p. 36) in the engine room crew as a wiper. He was paid on a monthly basis (Answer, R., pp. 8, 58). He was assigned off Finschaven, New Guinea, about 8 A. M. to cleaning and sweeping the hot, dusty forecastle where the temperature was about 100 degrees (R., pp. 41, 63, 190). It was customary and necessary for men to go out on deck for a breath of fresh air (R., pp. 191, 200). Petitioner left the forecastle and went a short distance to the tank top (R., pp. 84, 85) to lean against it and rest (R., p. 64). With the curiosity characteristic of a 16 year old boy, he looked into the half open tank (R., p. 64). Crew members working on the cover applied sufficient pressure to break a brass bolt 1½ inches in diameter, causing the cover to fall suddenly (R., pp. 66, 68). Petitioner suffered permanent injuries consisting of amputated fingers and injuries to his left hand (R., p. 159). After the accident the broken jack screw was examined. The end showed a flaw or airpocket (R., p. 174) the size of a dime or penny (R., pp. 125, 126). The break was clean around the perimeter (R., p. 126) but not at the center (R., p. 128), where it was discolored. The broken jack screw was replaced by a replacement part carried aboard because these jack screws

"worked hard" and were expected to break (R., p. 196). Some of them did break and nearly all of them bent (R., p. 127).

An examination of the record will disclose little, if any, conflict on the unseaworthy condition of the appliance which caused petitioner's injuries. The working pins were badly rusted (R., p. 98); the pins were corroded when the vessel was at San Pedro (p. 101); there was no way to get grease to the moving parts (p. 101); the rusty condition was apparent to the employees of the ship (p. 103); it was filed off after the accident (p. 107); the jack screws were corroded (p. 121); the swivel bearings would not revolve (p. 184); the jack screws worked hard (p. 195); there was a flaw or airpocket in the jack screw the size of a dime (p. 125); this flaw showed discoloration to a person not a metallurgist; it showed a clean, fresh break at the edges, but the center of the break was not clean; it was apparent that the metal was not completely joined (p. 128). There was testimony to the effect that the condition of the tank raising mechanism was generally bent and corroded (p. 131). The pins in the bolts were corroded (p. 172); the jack screws were frozen by rust and corrosion (p. 173).

Alfred Binder, the maintenance man, testified that conditions were poor (R., p. 131), that the pins were rusted and corroded and could not be moved easily (R., p. 131), that it was his duty to repair and condition these parts, that he knew there was a danger (R., p. 133), that he had asked the boatswain for authority to correct the condition but could not obtain such authorization (R., p. 133). The mate (who personally supervised this raising operation) stated that the top raising mechanism was not in poor condition before the accident but that he did not know the condition (R., p. 170) and had not examined the equipment (R., p. 172), although he knew of corrosion in the bolt. The break in this jack screw, as well as in the others that broke, was

due to strain as pressure was applied to the "frozen" mechanism (R., p. 173). The Chief Engineer testified that there had been previous trouble with jack screws on a previous voyage, and that they were expected to break, and that extra replacement parts had therefore been requisitioned (R., pp. 195, 196).

The petitioner was the youngest member of the crew (R., p. 36). He had been at sea for 2½ months, had never seen a similar accident (R., p. 87), knew that it was the deck department's job to open tank tops, had worked about other tank tops "butterworthing" or steam cleaning them (R., p. 50) when the tank covers were held at 45 degrees or more. There is nothing to indicate that he knew of any danger or had any reason to expect that a tank top cover held up by a 1½ inch jack screw would fall. He had had nothing to do with opening tank tops (R., pp. 70, 83). He did know that it was customary for the crew to lean against the tank tops, and he himself had had occasion to "hang around" them (R., p. 86).

Specification of Errors

The United States Circuit Court of Appeals, Ninth Circuit, erred:

(1) In holding and decreeing that petitioner assumed the risks of injury from unseaworthy equipment during the periods of time he was not actually working, and in not holding and decreeing that he did not assume those risks while "off-duty."

(2) In concluding that the petitioner was not entitled to recover and that his libel should be dismissed on the following findings of the trial court set forth in its opinion of December 4, 1947, herein:

> "The libelant, voluntarily and not in the performance of any work or duty which he was required to do or

perform, placed his hands on the edge of said tank and leaned forward, supporting his weight by his hands, for the purpose of examining the inside of said tank. Said acts on the part of the libelant were prompted solely and exclusively by the libelant's curiosity, and the libelant sustained injury to his hands when said tank top suddenly descended and pinched the libelant's fingers between the under surface thereof and the rim of said tank. * * * The libelant had no duties of any kind to perform at or near the tank top, and if the libelant had continued in the performance of his regular duties, he would not have been injured. * * * 'By placing his hands upon the rim of said tank while work was being done with reference to the tank top, the libelant (appellant) * * * assumed the risk of injury which might ensue.' Appellant contends that this holding was erroneous. In view of the conclusions reached by us, this contention need not be considered."

(3) In making the following ruling:

"Upon the facts found, the court correctly concluded that appellant was not entitled to recover, and that the libel should be dismissed with costs to appellee."

(4) In making the following ruling:

"The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

And in not finding and decreeing that the respondent was liable to petitioner for the unseaworthy and negligently unsafe condition of the ship, which conditions proximately caused petitioner's substantial injuries.

ARGUMENT

Point I

A seaman, while off duty aboard ship, does not assume the risk of injury due to unseaworthy appliance.

This point has been specifically reserved by this court in *Socony-Vacuum Oil Co.* v. *Smith* (1939), 305 U. S. 424, when it said:

> "We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty."

A distinction is drawn in the case of *Aguilar* v. *Standard Oil Co.*, (1943) 318 U. S. 724, between a seaman who leaves a ship for his own purposes and a seaman who goes ashore contrary to orders. This court appropriately pointed out that for the work on shipboard to move smoothly, relaxation ashore is necessary. In the case at bar it was likewise necessary for petitioner to fortify himself with a breath of fresh air before resuming his dusty job in the hot forecastle. It is likewise necessary for a seaman to sleep during part of his time aboard ship. The ruling in this case would deny him recovery for an injury caused by a defective bunk because he assumed a risk while not actually working, or for injuries suffered at any other time while not actually performing actual physical work.

We have adverted to the evidence showing that the petitioner had been to sea for 2½ months (R., p. 87); that he knew it was customary for the crew to lean against the tank tops (R., p. 86). He should not be charged with negligence for doing what experienced members of the crew had done.

In the case of *Northwestern Pac. Ry. Co.* v. *Fiedler* (CCA-9, 1931) 52 F. (2d) 400 (cert. den. 305 U. S. 605), it was held

that an employee may assume that an employer has exercised due care with respect to his safety until he is notified to the contrary, "unless the want of due care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them."

In this case the danger would not have been apparent to an experienced seaman who was not charged with inspection of the tank cover raising mechanism. There was no reason for petitioner to inspect the corroded jack screw, and there is no justification for expecting an inexperienced 16-year old seaman to anticipate that the men working on the mechanism would or could break a 1½ inch bolt by sheer brute force. It was likewise unforeseeable that the tank top would drop suddenly. If the danger was such that this inexperienced seaman should have seen it, it must have given rise to a duty upon the mate and crew members to have warned this youth away from a danger which he did not appreciate.

In the case of *Socony-Vacuum Oil Co.* v. *Smith* (1939) 305 U. S. 424, the defective appliance was known to the seaman. Here there is no showing that petitioner knew or should have known of the danger.

Petitioner urges that the ruling of the Circuit Court of Appeals and the District Court on this point is a long step backward to the triple defense of fellow servant rule, assumption of risk and contributory negligence that plagued the master and servant law of the nineteenth century. It can in no way be reconciled with the trend of this court's repeatedly expressed desire to "guard with jealousy the rights of seamen."

Petitioner was within the scope of his employment. The Circuit Court of Appeals and the District Court have wholly misconstrued the law applicable to the scope of a seaman's employment. The Circuit Court of Appeals, affirming the

lower court, held that petitioner alone was negligent in that he

> " * * * voluntarily and not in the performance of any work or duty which he was required to do or perform, placed his hands on the edge of the tank. * * * Said acts on the part of libelant were prompted solely and exclusively by the libelant's curiosity. * * * The libelant had no duties of any kind to perform at or near the tank top and if the libelant had continued in the performance of his regular duties he would not have been injured." (Opinion Dec. 4, 1947 herein).

This court in the case of *Aguilar* v. *Standard Oil Co.*, (1943) 318 U. S. 724, stated that the ship was not merely the seaman's place of employment, but was the "framework of his existence." If the seaman is "on duty" for the purposes of maintenance and cure while going to and from the ship, *a fortiori* he is "on duty" while he is catching a breath of fresh air during his actual work. The Chief Engineer testified (R., p. 200). "If we can't get a breath of fresh air, certainly we couldn't do our work"; and (R., p. 191) "Well, it is customary and necessary for a man to go out on deck and take a breath of fresh air in a relaxed position with a foot on a valve or something", and that petitioner's action was a "very customary procedure." The mate testified that getting a breath of fresh air was entirely authorized and a common practice (R., pp. 177, 178). Binder testified that petitioner's action was customary because the tank top was a good place to "lean on". (R., p. 135).

Numerous cases arising under Workmen's Compensation acts support the proposition that this action of petitioner did not exclude him from the scope of his employment:

In *Whiting-Mead Co.* v. *Industrial Acc. Comm.* (1918) 178 Cal. 505, 173 Pac. 1105, a workman, who temporarily ceased actual work to strike a match and accidentally ignited

a turpentine soaked bandage, was held to be within the scope of his employment.

See also the case of *United Dredging Co.* v. *Lindberg* (CCA-5, 1927), 18 F. (2d) 453 (cert. den. 274 U. S. 759) where the decedent sat down to rest.

In the case of *Wong Bar* v. *Suburban Petroleum Transport, Inc.* (CCA-2, 1941), 119 F. (2d) 745, it was said that a seaman is in the course of his employment until he has left the ship.

In *Meyer* v. *Dollar S. S. Line* (CCA-9, 1931), 49 F. (2d) 1002, the seaman was said to be in the service of the ship even while "off duty," because he is subject to call, although the court held that scuffling was "wrongful misconduct." (This holding has since been overruled.)

In *States S. S. Co.* v. *Berglann* (CCA-9, 1930), 41 F. (2d) 456, it was held that a seaman's employment includes not only actual time spent working, but also such ordinary tasks for his own comfort and convenience as are necessarily connected with his employment.

In the case of *Zurich General Accident Co.* v. *Brunson* (CCA-9, 1926), 15 F. (2d) 906, an employee was within the scope of his employment while eating lunch.

In *Sundberg* v. *Washington Fish and Oyster Co.* (CCA-9, 1943), 138 F. (2d) 801, an employee who was on deck watching seals, recovered because of an injury sustained through negligence of a fellow servant. The court held that, although he was "off duty" he was considered to be within the course of his employment because of his inability to leave the ship.

See also the cases of:

H. A. Scandrett (CCA-2, 1937), 87 F. (2d) 708;
Krey v. *U. S. A.* (CCA-2, 1941), 123 F. (2d) 1008;
The Alpha (E. D. Pa., 1942), 44 F. Supp. 809;
Nowery v. *Smith* (E. D. Pa., 1946), 69 F. Supp. 755;

Kyriakos v. *Goulandris* (CCA-2, 1945), 151 F. (2d) 132;

Radovcic v. *The Princ Pavle* (S. D. N. Y., 1942), 45 F. Supp. 15.

Petitioner was here taking a breath of fresh air, a customary and necessary incident to his hot, dusty job in intense humid tropical heat.

In conclusion, on this phase of the case, the Circuit Court of Appeals, Ninth Circuit, has decided an important question of law which this Court heretofore reserved for decision. The seaman, while seeking relaxation from arduous duties, chanced upon the negligent and unseaworthy condition which caused his injury. The lower courts have denied liability to him because it is said that his active duties did not require his being at the particular place which the defendant had permitted to become negligently unsafe and unseaworthy, and the court concluded that "had he continued in the performance of his regular duties he would not have been injured."

Because he sought another part of the ship in which to relax, the lower court found that he alone was negligent and the ship free from negligence, thereby avoiding discussion of the effect of the abolition of assumption of risk. In fact, the courts below concluded he assumed the risk of unseaworthy conditions which injured him during a time he was "off duty,"—a tautological way of saying he alone was negligent because the injury occurred while he was off duty. But the ship was at once his home and the place in which he worked. He could relax or be curious in no other place, and it runs against the whole spirit of decisions under the Jones Act and under the rules governing seaworthiness to say that the ship could permit negligent or unseaworthy conditions likely to cause injury to exist, like concealed traps about the

ship, without liability if the one who was injured thereby happened to be not actively performing assigned duties.

The Ninth Circuit, as well as other circuits, has repeatedly held that a seaman is protected against negligence and unseaworthiness while aboard ship during the time he is not actually performing work to which he has been assigned. This Court in *Socony-Vacuum Oil Co.* v. *Smith, supra,* reserved the question in the last paragraph of the opinion as to liability for injury from negligence or unseaworthiness to a member of the crew while off duty. Later this Court has answered in favor of liability the question of off-duty liability even on shore with respect to maintenance and cure. The present petition presents squarely the question of liability to a seaman on board the vessel under the circumstances of the reserved question with respect to liability for negligence or for unseaworthiness.

The Supreme Court of California in *Adams* v. *American President Line* (1944), 23 Cal. (2d) 681 (Opinion of District Court of Appeals 140 Pac. (2d) 47, 51) had presented the question whether the ship should be held liable on the principle of *respondeat superior* for a condition which a seaman had created during his time off duty. The court held that the ship was liable. This case is important because it reviews the federal decisions and teaches that the continuity of a seaman's employment is not broken during his hours off duty with respect to the obligation of the ship for his negligent acts causing harm to other seamen. At pages 686, 687, the Supreme Court held:

> "That the foregoing principles apply to a seaman while on the vessel on which he is employed becomes obvious. His employment requires him to spend his entire time on the vessel while it is at sea. His time is never wholly his own. On his hours off he is subject to call to duty in an emergency. Necessary incidents of life, therefore, such as sleeping, eating, washing, etc.

are contemplated to be within the scope of his employment. It has been said that the Federal Employers' Liability Act must be construed liberally to fulfill the purposes for which it was enacted. (Jamison *v.* Encarnacion, 281 U. S. 635, *supra*). In compliance with the injunction of liberal construction, the foregoing principles have heretofore been applied in defining what is the scope of employment intended by the Act."

POINT II

The formal findings of the District Court affirmed by the Circuit Court of Appeals, Ninth Circuit, do not correctly represent the views of those courts with respect to the issues of unseaworthiness, negligence and damages, the nub of the rulings by each court being that the petitioner was not acting within the scope of his employment while off duty.

The formal findings contain findings that the ship was not negligent, that the ship was not unseaworthy, at the beginning of the voyage, that the ship did not fail to take reasonable means to insure its seaworthiness for or during the voyage, that it was not improperly constructed as to the tank top mechanism, that the particular tank top here involved was not unseaworthy, and finally that the petitioner was not damaged (R., pp. 19, 20).

This blanket absolving of the ship from blame or fault is directly contrary to the trial court's opinion and decision. Without inspecting the testimony to ascertain whether in fact there was fault upon the ship, it can be seen that the trial court found as a fact that the ship was unseaworthy and negligent. The District Judge said (R., p. 214):

> "If this man here, in the course of the performance of his duties, had to go over and put his hands on the edge of that tank and lean over and look into it, then, I think there is no doubt but what he would be entitled to recover."

This statement can be based only upon the premise that the ship was unseaworthy, that the tank top vicinity constituted an unsafe place and that the ship was at fault. No other conclusion is possible to allow a recovery if the men were working, because such recovery would have to be based upon the ship's fault.

In the record (p. 209) the court indicated that the rule in the *Mahnich* case (321 U. S. 96) was applicable only when "the seaman who was injured was injured in the performance of some duty."

And at p. 210, the court said:

> "In other words, if, in the course of his employment, he had put his hands on the edge of that tank and peered over it in order to perform one of his duties, it couldn't be held that he had assumed the risk."

At page 211 the court indicated that:

> "Where a man does something which he assumes the risk of, which is not in the line of his duty, which he doesn't have to do and is injured by it, then, neither the ship or the owner is liable."

At page 212 the court said that the petitioner

> "went over and leaned over that and he didn't have to do that."

At page 212 the court said:

> "The man had a right to walk out but he certainly didn't have any right to go and put his hands on the edge of this tank top and put his whole head and shoulders under a moving 600 pound weight. And if he suffers an injury by virtue of that, I can't see how I can possibly grant him the right to recover."

At page 213:

> "No, he didn't know that the tank top was in that condition, but he knew it was dangerous, I would think, to put his head and hands under a 600 pound weight."

The court summarized its findings that the ship was at fault, but petitioner was to be denied recovery because a seaman temporarily "off duty" assumes the risk of any dangerous condition aboard his ship when it said (pp. 215, 216):

> "As I said, if this libelant here, in the course of his duties or in connection with them, was required to go and put his hands on the edge of that tank and peer into it, then there is no doubt in my mind but what he could recover, because then he wouldn't have assumed the risk, and the law wouldn't have required him to assume that risk. But he wasn't required to do that. He admitted that the only reason that he did it was to satisfy his own curiosity."

All of the court's discussion of "assuming the risk" is pointless unless there was some fault or unseaworthiness to assume.

Had there been no fault of the ship as the formal findings attempt to establish, there would have been no purpose in the finding of assumption of risk. Counsel for respondent in his zeal to obtain the advantage of a "no fault" finding was over-zealous and did violence to the clear facts in preparing the formal findings as to negligence, unseaworthiness and damages. The District Court and the Circuit Court of Appeals have overlooked this point.

The ship was at fault: The facts relating to the conditions which caused the injury to petitioner have been summarized in the Statement of Facts, and the record clearly and convincingly establishes that the ship was at fault in requiring the petitioner not only to work in unsafe and unseaworthy

surroundings, but likewise because of the nature of his employment to be subject to the dangers of those unseaworthy conditions during his hours off duty.

The courts below focused their attention upon his "off duty" status as the controlling feature of the case, and made the findings submitted in the District Court by respondent on a basis contrary to the reasoning of the courts below appearing in the record as hereinabove set forth and in the opinion of the Circuit Court quoted *supra* to the effect that petitioner came to a place of danger through his curiosity.

In the light of this situation the case of *Langnes* v. *Green* (1931) 282 U. S. 531, 537, holds that in admiralty cases this Court will review the record on appeal *de novo* and "must enter the judgment which should have been rendered by the court below on the record then before it" and "in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment below but to make such disposition of the case as justice may at this time require."

In *Mahnich* v. *Southern S. S. Co.* (1944) 321 U. S. 96, this court said that, although a finding of seaworthiness is usually a finding of fact, such finding was a conclusion of law and was reviewable. This court said in the *Mahnich* case that the exercise of due diligence does not relieve the owner of his obligation to provide seaworthy appliances, and *a fortiori* his obligation is unaffected when the negligence of the ship's officers contributed to its unseaworthiness. The duty to maintain a seaworthy ship is an absolute, "nonfault" obligation. The case at bar presents not only patent known defects, but defects of the type involved in the *Sieracki* case (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85). Since the *Sieracki* case is the last word of this court defining seaworthiness, and the evidence in the case at bar clearly brings the petitioner within the ambit of that de-

cision, the only question remaining is the question of liability to a seaman injured while not actually working.

The doctrine of *res ipsa loquitur* is applicable here by applying the case *Jesionowski* v. *Boston & Maine R. R.* (1947), — U. S. —; 67 S. Ct. 401, to the fact that this accident is one which ordinarily does not happen without the negligence of the ship. It is no wonder that the District Court in its oral decision found that the ship was at fault.

Conclusion

We, therefore, respectfully submit that the decision of the Ninth Circuit Court of Appeals in this case is in conflict not only with the decisions of this Honorable Court, but with the decisions of the majority of Circuit Courts where these questions have arisen, and that the uniformity of the admiralty law and certainty of its application is, therefore, seriously threatened; that the questions presented in this petition are of extreme importance and wide application to seamen; and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

Respectfully submitted,

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